Office - Supreme Court, U.S.
FILED
JUN 23 1982
ALEXANDER L. STEVAS,
CLERK

81-2345

NO. _____

IN THE
Supreme Court of the United States

October Term 1981

JOHN A. LYLE, PRO SE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

John A. Lyle, pro se
2104 Sea Palm
El Paso, Texas 79936
915-591-9181

Petitioner

Michael L. Paup
Attorney, Tax Division
Department of Justice
Washington, D. C. 20530
202-633-2000

Attorney for Respondent

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Commissioner of Internal Revenue or the Congress of the United States determines the nature of pay and allowances of retired members of the armed forces serving as instructors in Junior ROTC programs. (10 U.S.C. 2031 v. Revenue Ruling 71-307)

2. Whether military retirees serving as instructors in Junior ROTC programs overseas under employership of the Department of Defense are entitled to pay and allowances as though on active duty whereas those military retirees under employership of civilian school districts in the United States are denied pay and allowances as though they were on active duty. (Brant v. United States)

3. Whether military retirees serving as instructors in Junior ROTC programs must be on

active duty to receive quarters and rations allowances. (Brant v. United States)

4. Whether an internal revenue ruling deciding on what constitutes pay and allowances for military retirees serving as Junior ROTC instructors usurps powers reserved exclusively for the Congress of the United States under the separation of powers doctrine. (McCarthy v. McCarthy and United States Constitution)

5. Whether military retirees serving as Junior ROTC instructors are entitled to same pay and allowances as their active duty counterparts serving as Junior ROTC instructors. (Fifth and Fourteenth Amendments)

6. Whether military retirees serving as Junior ROTC instructors are entitled to the rights remaining to the citizens in the absence of federal or state statutes identifying specific pay and allowances components. (Tenth Amendment)

7. Whether the trial court (United States Tax Court) must refer to the parties involved by proper title to avoid confusion. (USTC Rules)

8. Whether the respondent in an appeals case can be a different government agency than the one in the trial court when the respondent in the appeals case was not present in the trial court and the petitioner was not provided notice there would be a substitution of the respondents until after the decision was made in the trial court. (USTC Rules)

9. Whether a decision in the tax court on a moving expense issue involving the 39-week rule under involuntary termination decides a tax issue involving a deduction for temporary living expenses which was not decided or debated in the tax court. (USTC Report 76 T.C. No. 56)

10. Whether military retirees serving as instructors in Junior ROTC programs may be discriminated against with respect to pay and allowances vis-a-vis their active duty counterparts serving in the same ROTC capacity. (Fifth and Fourteenth Amendments)

11. Whether tax exclusions for rations and quarters allowances of active duty military members are equivalent to tax deductions for quarters and rations for maintaining a temporary place of abode at a temporary site of employment in the Junior ROTC program by military retirees. (Internal Revenue Code of 1954, Section 162)

12. Whether the Commissioner of Internal Revenue can develop a legislative formula for pay and allowances of military retirees in Junior ROTC programs when the United States Congress passed the original law governing these retirees in the ROTC program. (Revenue Ruling 71-307)

13. Whether any judicial trial court or appeals court can establish a category of discrimination between active and retiree military members without the explicit approval of the Supreme Court as umpire of the judicial system or the tacit consent of the United States Congress as the military regulator. (Fourteenth Amendment)

14. Whether the tax home of a taxpayer can be determined in the appeals court when such home has not been adjudicated in the tax court. (USTC Report 76 T.C. No. 56)

15. Whether a fabrication in a brief must be struck down by an appeals court as an untruth when the fabrication is designed to offset a major claims court case relevant to tax matters being adjudicated. (Appellee Brief, Appeals Court, Fifth Circuit)

16. Whether cases quoted out of context in contravention to cases decided by the Supreme Court can be allowed to remain valid without comment by the appeals court. (United States v. Maryland Savings-Share Ins. Corporation)

17. Whether a federal district judge can be allowed to sit on a tax matter on appeal by a taxpayer and act in the appeals court the same as a circuit judge. (Appeals Court, Fifth Circuit Judgment)

Page

TABLE OF CONTENTS

Questions Presented for Review. . . . . i-vi

Opinions Below. 2

Statement of Jurisdiction 2

Constitutional Provisions, Statutes and Rules Involved 2

Statement of the Case 3

Argument and Reasons for Granting the Writ 4

1. The Tax Court and Appeals Court condone discrimination between military members performing same duty 5

2. The Tax Court and Appeals Court usurped powers reserved for Congress 6

3. The Tax Court and Appeals Court have denied due process and constitutional rights of military retirees 7

4. The Appeals Court has allowed a substitution of parties for the appeals process where the substituted party was not present in the trial court and the notice of substitution was not presented to the petitioner until after the trial court. 9

Page

Appendices

Appendix A Judgment of the Tax Court. A-1,A-2

Appendix B Judgment of the Court of Appeals B-1

Appendix C Memorandum Opinion of Tax Court C-1

TABLE OF AUTHORITIES

Table of Cases

Brant v. United States, 597 F.2d 716 (Ct. Cl. 1979). i

McCarthy v. McCarthy, 101 S.Ct. 2728 (S. Ct. 1981) ii,6

United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4 (1970) iii

United States v. Tyler, 105 U.S. 244 (1881). 6

Statutes

Internal Revenue Code of 1954, Section 162 (26 U.S.C.) iv,4, 5

10 U.S.C., Section 2031. . . . . i,3, 5,6,7

25 U.S.C., Section 1257(3) 2

Page

Revenue Ruling

Revenue Ruling 71-307, 1971-2 Cum. Bull. 78. . . . . iv,1,3, 6,7

Constitutional Amendments

Fifth Amendment, United States Constitution. . . . . ii,iv, 2,7

Tenth Amendment, United States Constitution. ii,2,6

Fourteenth Amendment, United States Constitution. . . . . ii,iv, v,2,7

Miscellaneous

USTC Report, 76 T.C. No. 56. iii

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981

JOHN A. LYLE, PRO SE,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

John A. Lyle, Petitioner, respectfully and most sincerely prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit, filed on April 1, 1982.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit affirmed the Tax Court decision regarding rations and quarters allowances in a judgment filed April 1, 1982. The court issued a judgment without filing an opinion or memorandum stating the reasons for upholding the trial court. The judgment is attached. The record will be certified.

STATEMENT OF JURISDICTION

The date of the judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed is April 1, 1982, date of filing. The United States Supreme Court has jurisdiction under 25 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

1. Fifth, Tenth and Fourteenth Amendments, United States Constitution.

a. Fifth: Prohibition against taking of property without due process.

b. Tenth: Rights reserved to the citizens.

c. Fourteenth: Prohibition against discrimination in employment.

2. 10 U.S.C. 2031d(1)

> (1) Retired members so employed are entitled to receive their retired or retainer pay and an additional amount of not more than the difference between their retired pay and the active duty pay and allowances which they would receive if ordered to active duty, and one-half of that additional amount shall be paid to the institution concerned by the Secretary of the military department concerned from funds appropriated for that purpose.

3. Revenue Ruling 71-307, 1971-2 Cum. Bull. 78. Establishes a formula for compensation for military retirees in Junior ROTC programs governed by 10 U.S.C. 2031.

STATEMENT OF THE CASE

Petitioner Lyle was employed as a retired member of the Regular United States Army as an instructor in the Junior ROTC Program.

Lyle claimed quarters and rations deductions for five months of ROTC duty in 1976 as though he were on active duty. The Commissioner of Internal Revenue denied the deductions. Lyle filed a petition with the United States Tax Court. The Tax Court found for the Commissioner. Lyle appealed to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the Tax Court decision. Petitioner Lyle prays for a writ of certiorari. to review the tax court and appeals court decisions issued on August 20, 1981 and April 1, 1982, respectively.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

The case involves a departure from the accepted and usual course of military adjudications and civilian judicial proceedings by the United States Tax Court and the Fifth

Circuit Court of Appeals to such an unorthodox extent that judicial umpiring and supervision by the Supreme Court of the United States appears justified.

The Tax Court and Appeals Court have decided questions of federal law which conflict with decisions by the Supreme Court and the United States Court of Claims regarding status of military retirees and their pay and allowances.

1. Military retirees and active duty military members perform identicial ROTC duties. Active duty members have quarters and rations allowances excluded from gross income. (Internal Revenue Code 1954, Section 162) The retiree members were guaranteed the same compensation as the active duty members. (10 U.S.C. 2031d) The Internal Revenue Service attempts to clarify 10 U.S.C. 2031(d) by establishing a formula for compensation for the military retirees in ROTC programs. The formula denies the retirees

quarters and rations exclusions. (Revenue Ruling 71-307)

2. Petitioner Lyle argues that the intent of Congress in 10 U.S.C. 2031d governs the military retiree pay and allowances question in the ROTC program: Lyle asserts that the Revenue Ruling 71-307 is unconstitutional for several reasons as follows: First, Revenue Ruling 71-307 usurps the power of Congress to regulate the military retiree under the "separation of powers doctrine" recently upheld in McCarthy V. McCarthy and United States v. Tyler.

Second, if 10 U.S.C. 2031d is remiss in establishing definitive law governing the military retiree in the ROTC program, then, since Revenue Ruling 71-307 is neither federal nor state law, the Petitioner is protected by the Tenth Amendment clause "rights remaining to the citizen".

Third, 10 U.S.C. 2031d establishes a parity concept for military retirees and active members in ROTC programs whereas Revenue Ruling 71-307 causes personal property in the form of tax deductions to be taken from the retiree's quarters and rations allowances without due process clearly in contravention to the Fifth Amendment. Added, the respondent's revenue ruling establishes discrimination in employment among military retirees and active members performing the same ROTC duty. This clearly obviates military law and contravenes the "equal protection" clause of the Fourteenth Amendment.

3. A precedent arose in this case after the decision of the United States Tax Court as the trial court. The United States Court of Appeals for the Fifth Circuit allows a substitution of parties without providing notice to the petitioner in the trial court

and without the respondent's substituted party being present in the trial court. (This contravenes the established Rules of Practice and Procedure of the United States Tax Court, January 1974). The effect of this substitution reflects Nazism and puts the appellant at a distinct legal disadvantage. The appeals court reviews the appeal based on the clout of the opposing parties vis-a-vis legal representation instead of the merits of the taxpayer's evidence showing loopholes in the tax law. The appeals court affirmation of the tax court decision does little if anything to develop taxpayer respect for the collection system. Indeed, allowing the Justice Department to be substituted for the Commissioner of Internal Revenue upholds a tyrannical executive or any unscrupulous member of the federal system wanting to look vindictively or otherwise at the tax report of the citizens. Therefore,

the Tax Court Rules of Practice and Procedure should be revised to require that petitioners be given notice of substitutions before the trial court gets underway.

4. The Appeals Court used a District Judge Van Pelt to sit by designation. The substitution of a district judge from outside the district of the taxpayer's residence is in contravention to the Internal Revenue Code of 1954, Section 3629 (Federal Tax Course). The proper district court is where the taxpayer resides in Texas and not in Nebraska if a substitution of judges is deemed appropriate in tax cases. This deviation from procedure is highly questionable.

5. Summary: The Tax Court and Appeals Court erred in this case because of mistakes of law governing military retirees performing in the ROTC program governed by military law and the Congress under 10 U.S.C. 2031.

Therefore, Petitioner Lyle prays that the Honorable Supreme Court will grant this Writ of Certiorari to review the military and tax issues of this case.

APPENDIX A

UNITED STATES TAX COURT

JOHN A. LYLE,	X
	X
Petitioner,	X
	X
v.	X
	X
COMMISSIONER, Internal Revenue Service,	X
	X
Respondent.	X

DECISION

Transmitted in certification of the case by the Clerk, United States Court of Appeals for the Fifth Circuit as requested by Petitioner.

NOTE: The Fifth Circuit Court will certify the record in this case only if the Supreme Court grants the petition for writ of certiorari. See attached letter, Appendix A-2.

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

[redacted]

May 24, 1982

[redacted]

Mr. John A. Lyle
2104 Sea Palm
El Paso, TX 79936

No. 81-4381 - John A. Lyle and Glenna Lyle
v. Commissioner of Internal Revenue

Under revised Rule 19.1 of the Supreme Court effective June 30, 1981, a record is no longer required in connection with an application for writ of certiorari and, therefore, will not be routinely prepared by this office. 38 USLW 3502. However, in the event this office is notified by the Supreme Court that the petition for writ of certiorari has been GRANTED, the record will be certified to the Supreme Court.

A copy of the opinion, if any, judgment, or Rule 21 decision, and the denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By Linda St. Pierre
Deputy Clerk

Enclosures

REVISED RULE 19.1 OF THE SUPREME COURT

Effective June 30, 1980, under revised Rule 19.1 of the Supreme Court, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by that Court.

APPENDIX A-2

S. Ct-2

APPENDIX B

THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-2474

John A. Lyle, Appellant,

v.

Commissioner of Internal Revenue, Appellee

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Before: GEE and SAM D. JOHNSON, Circuit Judges, and VAN PELT, District Judge*

Per Curiam
Affirmed.
See Local Rule 21.

*District Judge of the District of Nebraska, sitting by designation.

APPENDIX C

UNITED STATES TAX COURT

USTC REPORT 76 T.C. No. 56

JOHN A. LYLE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPORT

Transmitted in certification of the case by the Clerk, United States Court of Appeals for the Fifth Circuit as requested by Petitioner.

NOTE: The Fifth Circuit Court will certify the record in this case only if the Supreme Court grants the petition for writ of certiorari.

Office - Supreme Court, U.S.
FILED
JUN 21 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2345

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN A. LYLE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2345

JOHN A. LYLE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question presented in this federal income tax case is whether petitioner, a retired Army officer who was employed by a high school district to teach ROTC, was entitled to exclude any portion of his salary as an "allowance" for subsistence or quarters paid to active-duty members of the Armed Forces.

The pertinent facts may be summarized as follows: In 1974, petitioner retired from active service as an officer in the United States Army. For five months in 1976, petitioner was employed by the Ector County Independent School District as an instructor for the Junior Reserve Officer Training Corps ("Junior ROTC") program at Permian High School, Odessa, Texas. The school district paid petitioner $5,134.53 for his services as instructor. In addition, petitioner received his regular military retirement pay.

On audit, the Commissioner rejected petitioner's contention that he was entitled to exclude a portion of his salary for teaching Junior ROTC under Treasury Regulations on Income Tax (1954 Code), Section 1.61-2(b) (26 C.F.R.). That Regulation provides that "[s]ubsistence * * * allowances granted commissioned officers * * * of the Armed Forces * * * and amounts received by them as commutation of quarters, are to be excluded from gross income." The Tax Court[1] held that the petitioner was not entitled to exclude any portion of his salary as a subsistence and quarters allowance, and the court of appeals affirmed (Pet. App. B).

1. Petitioner argues (Pet. 5-7) that he received excludable subsistence and quarters allowances in reliance on 10 U.S.C. 2031(d), which provides, *inter alia*, that retired officers teaching Junior ROTC may continue to receive their retirement pay and that high schools employing such officers may pay them "an additional amount of not more than the difference between their retired pay and the active duty pay and allowances which they would receive if ordered to active duty."

The courts below correctly held that this statute only prescribes a formula for the maximum amount of pay retired officers may be given and does not provide them with excludable "allowances." See *Sweeney* v. *United States*, 74-2 U.S.T.C. (CCH), para. 9672 (N.D. Ga. 1974); *Scott* v. *United States*, 74-1 U.S.T.C. (CCH), para. 9281 (D. S.C. 1973). See also Rev. Rul. 71-307, 1971-2 Cum. Bull. 78, 79; 55 Comp. Gen. 44, 48 (1975). Moreover, the statute itself specifically refutes petitioner's reading. Section 2031(d)(2) provides that retired officers teaching Junior ROTC are not "considered to be on active duty or

---

[1]The findings of fact and opinion of the Tax Court are reported at 76 T.C. 668 (1981).

inactive duty training *for any purpose*" (emphasis supplied). Since one must be on active duty or on training to be eligible for subsistence and quarters allowances (see 37 U.S.C. 204(a)(1) and (2); 402 and 403), it is clear that retired officers are not eligible for those allowances.

Petitioner's contention (Pet. 7) that the statute reflects Congress' intent that retirees be treated the same as active duty officers, who would be entitled to allowances, is also refuted by the statute which expressly provides that retirees may be paid less than the equivalent active duty pay. Nor does this different treatment, as between retired and active duty officers, violate the Constitution, as petitioner contends (Pet. 6, 7). Their obvious differences in legal status are sufficient to justify different treatment. Cf. *Puglisi* v. *United States*, 564 F. 2d 403, 409-411 (Ct. Cl. 1977), cert. denied, 435 U.S. 968 (1978).[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JULY 1982

---

[2]Contrary to petitioner's assertion (Pet. 5), the decision below does not conflict with decisions either of this Court or of the Court of Claims.

DOJ-1982-07